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In the Supreme Court of the United States

OCTOBER TERM 1962

No. [redacted]9 199

FRANK T. BELL,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

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COMES NOW Frank T. Bell, petitioner, by and through his attorney, and respectfully prays the Court that a Writ of Certiorari shall be issued to review the judgment of the Supreme Court of the State of Washington entered on March 30, 1962, denying the Petition for Rehearing of this Petitioner and, therefore, affirming the judgment of conviction of Petitioner.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is set forth in the Appendix, *infra*, page 27a, and may be found in 368 P. 2d, 177,

The whole of the text of the Memorandum Opinion of the judge of the superior court holding that the Petitioner was guilty of perjury is incorporated in the

opinion of the Supreme Court of the State of Washington, and is found at pages 182-186 of 368 P. 2d and at pages 34a-43a of Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC, Sec. 1257(3) to review the denial of the petition of Petitioner for a rehearing of the judgment of the Supreme Court of the State of Washington affirming Petitioner's conviction of perjury.

On March 26, 1962, the Supreme Court of Washington denied without opinion this petition for rehearing of its judgment against Petitioner.

QUESTIONS PRESENTED

1. Where the trial judge admitted, over Petitioner's repeated objections, a great mass of highly prejudicial evidence relating to transactions in nowise connected with the indictment for perjury, and where the trial judge demonstrated by his opinion and findings that this prejudicial evidence influenced his decision of guilt, and where the appellate court refused to consider the many assignments of error based on the admission and consideration of this prejudicial evidence on the ground that the trial judge was presumed not to have considered this prejudicial evidence, is not this refusal of the appellate court to pass on these assign-

ments of error a denial of due process under the 14th Amendment to the Federal Constitution?

2. Was it Due Process for the trial judge to violate the secrecy of the grand jury by permitting the prosecution to introduce into evidence *all* of the testimony of Petitioner before the grand jury, the great bulk of which had no pertinence to the charge of perjury, but pertained to suspicions of misconduct between the contractor and the manager of the PUD, while at the same time excluding Petitioner's counsel from any inspection of the grand jury's proceedings and minutes relating to Petitioner's testimony?

FEDERAL QUESTION COULD ONLY BE PRESENTED BY PETITION FOR REHEARING.

EXHAUSTION OF REMEDIES.

Petitioner rightfully expected that his assignments of error respecting the illegitimate use of prejudicial evidence, and the violation of the secrecy of the grand jury would be heard and considered by the Supreme Court of Washington, and was greatly surprised when that Court refused to hear or pass on them. Thus, Petitoner's first opportunity to present these federal questions could only arise on his Petition for Rehearing.

We have made the Petition for Rehearing a part of the record transmitted to this Court so that your Honors will see that the primary issue raised by our

Petition. (Pet. pp. 3, 10-21) is the issue of due process under the Fourteenth Amendment, because the Supreme Court of Washington refused to review the trial court's action in admitting wholesale, massive prejudicial evidence of the alleged misconduct among the contractor, McLean and the manager of the PUD, just as if this were a conspiracy trial rather than a trial for perjury.

When that Petition for Rehearing was denied, Petitioner had exhausted all remedy in the State Courts and had no recourse but to appeal to this Court for Writ of Certiorari.

STATUTE INVOLVED

Title 28 USC, Section 1257(3) :

> ". . . Final judgments or decrees rendered by the highest courts of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ". . .
>
> "(3) By Writ of Certiorari . . . where any title, right, privilege or immunity is specifically set up or claimed under the Constitution . . . "
> June 25, 1948, C 646, 62 Stat. 929."

STATEMENT OF THE CASE

In the middle fifties, Grant County, loc. d in the Columbia Basin desert, small in population and resources, but great in ambition, at the instance of a

group of its leading citizens, of whom Petitioner was best known on the national scene, undertook and carried to successful completion a $100 million hydroelectric plant by means of the creation of a Public Utility District (herein referred to as the "PUD"). (R. p. 4).*

Petitioner had taken a foremost part in promoting this vast enterprise, making repeated trips to the national capital, and elsewhere, to secure authorization. He received no compensation and in substantial part these trips were taken at his own expense (R. pp. 134-136, 138, 149, 187, 971-978).

Thereafter, while the hydroelectric plant was under construction, a controversy, if not a feud (R. pp. 8-10), broke out between Nat Washington, state senator and counsel for the PUD, and Glen Smothers, by then the general manager of the PUD.

Rumors gained currency that corruption was afoot between the general contractor and the PUD'S manager, Glen Smothers, who had accompanied Petitioner to Washington on at least one of his trips. These rumors created widespread, red hot indignation in this community and resulted in the calling of a grand jury.

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*Page references preceded by "R" are to the record of the testimony; those preceded by "Tr." are to the transcript of the pleadings, etc.; those preceded by "A" are to the Appendix of this Petition.

In the course of the grand jury's extended deliberation, it became known to Petitioner that his name had been involved in the testimony submitted to it. Thereupon, on November 5, 1958, Petitioner voluntarily appeared before the grand jury, offered to testify, signed a waiver (R. pp. 68-9, 981) and brought with him sundry cancelled blank checks that he thought would bear on his testimony (R. p. 69). These checks represented certain fees paid by Petitioner to Glen Smothers as an engineer.

On being assured that the grand jury's deliberations were and would remain secret (R. p. 74), Petitioner testified freely as to all inquiries made of him by the special prosecutor, assisting the grand jury (R. pp. 68-103).

Since Petitioner was thus testifying before the grand jury, it is obvious that he did not have the benefit of legal counsel, but was strictly on his own. On March 13, 1959, Petitioner was recalled by the grand jury and again voluntarily appeared and gave further testimony in harmony with his earlier testimony (R. pp. 228-303, 982-984). At the time, Petitioner was 76 years of age (R. p. 971) and had lived for more than half a century in Grant County, save when in the service of the federal government where he occupied the eminent position of Director of the Bureau of Fisheries for ten years (R. pp. 971-3). He had earlier served as county treasurer and had borne an honored name (R. pp. 396, 971-3). His testimony, taken as a whole, shows that he

suffered from the usual infirmities of advanced age, such as being quite hard of hearing, and forgetful of names.

This grand jury was in session sifting these charges for many months. Seemingly it never uncovered enough evidence to warrant indictment of either Smothers or the contractor, so vented its frustration by indicting Petitioner for perjury. Gossip, like death, "loves a shining mark," so the grand jury struck at the region's foremost citizen.

Petitioner was indicted by the grand jury on five counts of perjury. The first three counts of this indictment variously charged that Petitioner had testified before the grand jury that he was employed by McLean Finance & Improvement Company of New York (herein referred to as McLean) to investigate a project in Juneau, Alaska, and several other projects, and that he received payment for his services and travel expenses by McLean in the sum of $5,568.49. So much of Petitioner's testimony was not contradicted. But he further testified that one Lewis M. Schott employed him on behalf of McLean, explaining that Schott was an official or agent of McLean, and that he and Petitioner agreed on the amount of his compensation. At the trial, Schott testified that he did not so employ Petitioner, that he, Schott, was not an officer or agent of McLean and that he had not agreed with Petitioner on the amount of his compensation. This conflict of testimony raised one of three infer-

ences: Either that aged Petitioner's memory was faulty as to the man; or that Schott was failing to tell the truth; or that Petitioner was using Schott's name to hide the identity of someone else and, in this particular, was testifying falsely, App. A, p. 30a).

The two remaining charges of the indictment charged that Petitioner had testified that he had received $6,500 as a finder's fee or as a commission from Shoup Voting Machine Company for sales of voting machines in Clark County, Washington, and in Portland, Oregon. It was not denied by any of the testimony that Shoup Voting Machine Company did pay $6,500 to Petitioner, which, Petitioner testified, was paid him as a finder's fee. Count 4 of the indictment charged that it was not true that Petitioner received the check as a finder's fee, and Count 5 charged that it was not true that Petitioner received the check as a commission on a sale, although Petitioner had claimed it no more than a finder's fee for finding potential customers in these areas (App. A, p. 32a).

The testimony ostensibly contradicting Petitioner on these five counts was given by the witnesses Schott and Joseph Rosenbaum. These two men were long time friends of Petitioner and supposed themselves to be correcting some sort of mistake made by Petitioner.

In his opinion, the trial judge has said of the testimony of these two witnesses, on whom the prosecutor relied, as showing perjury:

> "Now, I do not believe everything that Mr. Rosenbaum said and I do not believe everything that Mr. Schott said; I am highly suspicious of Mr. Rosenbaum." (App. A, p. 42a).

These charges of corruption had been so sensational and so repeatedly aired in the local papers that Petitioner's counsel saw that it would be impossible to impanel a jury free of the regional prejudice thus created, so a jury was waived, and a trial judge from another part of the state was sent in to try the case.

The county also brought in from the outside an experienced criminal prosecutor, and a most extraordinary method of seeking conviction was adopted by him. Presumable because the evidence of perjury was both weak and of dubious import, the prosecutor ransacked the grand jury's proceedings for instances of alleged "gifts and gratitudes" that, undenied or unexplained, involved Smothers and the contractor and put them in evidence. It was not claimed that any of these incidents had anything whatever to do with the charge of perjury. They were used by this astute and ingenious prosecutor to show the "materiality" of the alleged false testimony of Petitioner. Then, once in evidence, the huge volume of this evidence comprising over 1,200 pages of testimony and 280 pages of pleadings, court orders, etc., was ruthlessly and skillfully used to smear Petitioner as one of the conspirators who defrauded the PUD, though the testimony relevant to perjury was less than one sixth of the total.

We set forth in Appendix B four leading transactions thus used. Since their irrelevance to the charge of perjury has at no time been challenged, though they occupy so large a part of the record, they need not encumber the text of this petition, but are nevertheless useful to show to what great lengths this conspiracy charge was carried, to blacken Petitioner in the eyes of the trial judge.

These incidents, linked together, have all the fascination of a detective story, told by a master hand. Was there bribery and corruption going on? If so, then punishment should be meted out to some one.

The vice of this method of persuation is, of course, that only one side of these transactions was exposed to view. The defense of the principals in them, Smothers and the contractor, was never heard, nor was Petitioner permitted to controvert or explain any of them. As the trial judge pointed out many times in ruling in their admissibility, their truth or falsity was not in issue. They were admitted for a single, narrow purpose to prove materiality of the alleged perjury. Petitioner was convicted, in the eyes of the trial judge, of being a "conspirator" with the contractor and its agents in an attempt to defraud the PUD, and thus would, no doubt, testify falsely. That the conspiracy itself was not legitimately proved, that counter evidence to show innocence was neither received nor receivable escaped the attention of the trial judge.

On appeal to the Supreme Court of Washington from this verdict, where the Court's attention was challenged to this prejudicial evidence and its use, the Supreme Court several times applied a presumption that the trial judge disregarded this inadmissible evidence and therefore refused even to consider its prejudicial and inadmissible character. This, in spite of the fact that, as we shall see, the trial judge frankly admitted that he had taken it into consideration.

This presumption that the trial judge disregards inadmissible evidence, as this court well knows, had its origin in equity where, on appeal, the case was heard de novo. This presumption has gradually infiltrated civil cases, when the appellate court can see that the admissible evidence fully supports the conclusion of the trial court. Of late even in a few criminal cases it has been used, but always with great caution, where the appellate court can see that no damage to a defendant has resulted from the admission of such questioned evidence.

Medical science has discovered that strychnine, administered in minute doses, is of value as a heart stimulant, but in larger doses it kills. So, here. The farthest stretch of this rule thus far reached in any of the cases is that the trial judge will be presumed to have considered only relevant and admissible evidence where the challenged evidence is tiny in amount and on the periphery of admissibility.

But if this precedent established by the Washington Court receives the blessing of this court by denial of the Writ, the damage that will result in innumerable cases is incalculable, once trial judges, even in criminal cases, are given a blank check, are in effect told that they may admit prejudicial evidence in any amount, without fear of reversal, since appellate courts will presume their infallibility in disregarding it, even when they are incautious enough to admit they were influenced by it.

This, it seems to us, is a most flagrant deviation from the rule that American Courts are vigilant to see that every accused has a fair trial, in which due weight to the presumption of his innocence is maintained until he is proved guilty beyond a reasonable doubt, without the use of irrelevant and prejudicial evidence that can so often convict an innocent man, once the bars are let down and everything that an astute prosecutor offers is admitted.

REASONS FOR GRANTING THE WRIT

1. Supreme Court's Presumption of Infallibility of Trial Judge as a Denial of Right of Appeal.

In Appendix A, where we have placed the opinion of the Supreme Court of Washington in this case, containing the opinion also of the trial judge, we have caused to be printed in italic type each of the several statements of the Court that it will presume, in a trial to the Court without a jury, "that the trial judge did

not consider immaterial evidence in reaching his decision." (App. A, pp. 51a, 56a, 61a, 62a, 63a).

This great mass of prejudicial evidence was presented to the Court in 69 assignments of error, ranged in groups, and each was met by the Supreme Court's use of this presumption.

What makes this refusal of the Court to consider these assignments of error more serious and gives to it a wide significance in future trials is the Court's extension to criminal cases of the presumption in equity, as stated in *Deginger v. Martin*, 48 Wn. 1, 92 Pac. 674, that whenever any case, hereafter, civil or criminal, is tried to the court without a jury, it is suggested to the trial judges that

> ". . . a liberal practice should be adopted in admitting evidence so that this court, in the event of an appeal, will on a trial *de novo* have all material facts before it." (App. A, p. 62a).

To extend this rule of equity, where the case is tried de novo on appeal, to criminal cases is most dangerous to the liberties of any accused, who is compelled, as was this Petitioner, to submit his case to the tender mercies of the trial judge. Is it possible that this court will hold this presumption of infallibility of all trial judges to be due process, in a criminal case, thus to encourage ambitious prosecutors to strain every nerve to drag prejudicial evidence into such a case, to get a conviction, then, once the evidence is laid before the trial judge, to have the appellate court blandly remark: "We must

presume that the trial judge didn't consider this evidence?"

But there is even a more serious question for the Petitioner involved here. For the Washington Supreme Court, in line with numerous decisions in civil cases, both state and federal, does approvingly quote from *State v. Ryan*, 48 Wn. 2d, 304, 308, 293 Pac. 2d, 399, where this presumption was applied, the qualifying phrase (App. A, p. 63a):

> "Unless it appears that the findings are based on the evidence which should have been excluded."

This is precisely our major point! The opinion of the trial judge, and his findings demonstrate beyond question that the trial judge did take into consideration this prejudicial evidence, not just for materiality of the alleged perjury, for which alone it was deemed admissible, but for the purpose of reaching his decision on the merits, where his findings and oral opinion demonstrate that it importantly influenced his decision.

In such a case as this, where such a huge volume of highly prejudicial evidence had been admitted, allegedly merely to show materiality of the perjury, we would naturally expect some disclaimer by the court that he had considered it solely for that purpose, that he was placing his decision solely on the admissible testimony. But not only is there no such disclaimer,

but, after two pages of general remarks, the trial judge, in his opinion, frankly states:

> "I come now to a brief analysis of the evidence in this case which I think is material to the decision which I have reached. . . .
>
> "As I stated in ruling early in the case, the only fair way to analyze testimony in a charge of this nature is to read *all of it* so that it cannot be read out of context, and I have *read and reread* the testimony in this case carefully . . ." (emphasis supplied) (368 Pac. 2d, 184; App. A, p. 39a).

Even if there were not other confirmatory evidence in the opinion and in the trial judge's findings that he did consider this prejudicial testimony, this would suffice to demonstrate that the court gave substantial weight to this prejudicial evidence.

An exact parallel for the statement of the trial judge in this case is found in *Fotie v. U. S.*, 137 F. 2d 834, 840, where the Court said:

> "The judge's statement that the great mass of testimony had been placed in his hands, and he had studiously gone through all of it justifies the inference that he took into consideration and gave weight to the inadmissible testimony. . . ."

Accordingly, the U. S. Court of Appeals for the 8th Circuit reversed the conviction.

This statement is particularly applicable here, where the testimony relevant to perjury is so little, and the mass of prejudicial evidence is so great.

Again, the trial judge twice in his opinion referred to Petitioner's involvement in a conspiracy, commenting both times on

> ". . . the peculiar problem presented by the circumstances of this case which have forced the State to reply upon the testimony of two men who, their evidence suggests, are fellow conspirators . . ." (368 Pac. 2d, 183, 185; App. A, p. 37-8a, 41a).

It seems to us plain that it was this reading of "all" of the testimony that convinced the trial court that Petitioner was a "conspirator" and that the two State witnesses were his "fellow conspirators." Could there be any greater manifestation of the poisonous result of this prejudicial testimony? Why, then, does the trial judge accuse Petitioner of being one? The logic of this twice repeated charge that Petitioner was a conspirator would seem to be that, if he is a conspirator, then the judicial surmise that he is guilty of perjury hardens into conviction when the judge considers his guilt as such conspirator — a crime of which he was not accused, where he had not been allowed to defend.

The trial judge having said that he had read and reread all of the evidence, in his next paragraph remarked:

> "As I read the testimony I could sympathize with the grand jurors and I would subscribe to their comments that the story he was telling them was improbable, almost an insult to their intelligence." (368 Pac. 2d, 184-5; App. A, p. 40a).

The only time when members of the grand jury interrupted Petitioner's testimony to say that the story he was telling them was "improbable" is when in Petitioner's testimony before the grand jury he was giving them his account of his investment in Agencia Industrial (R. pp. 173, 179). Manifestly, the testimony of Agencia Industrial was introduced to prejudice the trial judge. Plainly, it had that effect.

We have made a most extensive research and believe that we have examined every case, state and federal, where this presumption that the trial judge disregards inadmissible evidence was applied. We have not found one — NOT ONE! — where the prejudicial evidence admitted was so massive in amount, so prejudicial in character, and where the trial judge frankly admitted his reliance on that prejudicial evidence.

In the concluding paragraph of his opinion the trial judge went further to comment on this prejudicial evidence (summarized in App. B.), as follows:

> "I agree with the prosecution that the circumstances concerning the obtaining of the $87,000 fee . . . I agree with the prosecution that the circumstances as explained in this court room are highly suspicious. I agree with the prosecution that the circumstances of giving of the diamond drilling contract to the so-called McLean Engineering Company are even more suspicious, and I agree with the prosecution that the fact that one-half of the $6,500 fee in connection with the voting machines, one-half of which found its way into Mr. Smother's pocket . . . is also highly suspicious." (App. A, p. 42a).

In the language of everyday life what the trial judge is saying is: Here is dirty money, here is skulduggery, here is crookedness that deserves to be punished. By considering this testimony judicial wrath was raised, and since neither Smothers nor McLean nor the contractor were before the court, that wrath struck at the unfortunate Petitioner, the one man who had nothing to do with either the Extra Work Orders or the Lynch-McClintock subcontract, or the McLean transaction, all summarized in App. B.

Surely it cannot be denied that the trial judge, in voicing these suspicions and saying that he agrees with them is demonstrating that he considered all this highly inadmissible and prejudicial evidence, and that he was influenced against Petitioner by it. Furthermore, in App. B there are contained five paragraphs and four subparagraphs of the findings of the trial judge relating to these wholly irrelevant episodes there recited which had nothing to do whatever with the perjury. In fact, reading the opinion as a whole, it appears that it is drenched with the trial judge's views of this prejudicial testimony, on which alone the Petitioner was supposed to have been tried.

2. Petitioner Entrapped by Introduction of this Presumption After Petitioner's Election to Waive Jury Trial.

The decisions of the Supreme Court of Washington demonstrate that prior to *this* decision by the Appellate Court, there had never been the slighest intimation

in any of its decisions that this presumption of equity that the trial court does not consider inadmissible evidence could or would be used in a criminal case.

When the critical decision was made by Petitioner to submit his case to the court without a jury, he had every right to expect that the same rules of evidence would be applied by the court sitting without a jury as would be applied in a jury trial.

It is unthinkable that any judge would admit this great mass of prejudicial evidence before a jury. When, without the slightest warning, the Supreme Court of Washington introduced this drastic change in a criminal case for the first time after Petitioner's conviction, is not this, of itself, a violation of due process?

Petitioner would never in the world have consented to such a trial by the court alone if he could have foreseen that this vast mass of prejudicial evidence would be admitted, so highly damaging to his defense. Yet, by this announcement of this rule *for the first time* in a criminal case, Petitioner is entrapped. He suffers a mortal blow to his freedom from this radical innovation, that so greatly broadens the admission of evidence, vitally damaging to him because he has been denied the right to defend against it.

3: Far More is Involved than the Liberty of this Petitioner.

A reading of *Irvin v. Dowd*, 366 U. S. 717, where this Court reversed a conviction solely because of the widespread knowledge by the jury of the publicity

given to the crime, demonstrates that this Court is keenly sensitive to the way in which sensational publicity creates so hostile a climate in a whole region that it is impossible to obtain an unprejudicial jury to try the accused.

This experienced court will recognize, too, that a conspiracy scandal, dealing with public funds, is especially damaging to every man accused of participation, though his only involvement may be in business or social friendship with one of the principals.

Where, as with this Petitioner, an accused is so convinced of his innocence that he abandons that most precious right, trial by jury, and submits his defense to the court alone, should not such a trial have all the safeguards normally attaching to a jury trial? For judges are human and if their minds are subjected to prolonged saturation in highly prejudicial evidence, they can react to it as did the trial judge here.

Thus, where the appellate court, as in this case, establishes the rule that the trial court in criminal cases should be liberal in admission of prejudicial evidence (by it politely called "immaterial"), with the assurance that the appellate court will presume that the trial judge was infallible in disregarding all of it, (App. A, p. 62a) a trial by the court alone becomes a trap for the unwary in a criminal case. On the other hand, no lawyer acquainted with this precedent could permit his client to run such gauntlet of prejudicial evidence as was here admitted.

Dare we permit this one door of escape, trial by the court alone, to be slammed shut against any accused, the helpless victim of widespread prejudice, when that prejudicial evidence can be permitted to flow, like a surging river, over all the evidence material to the accusation?

This case is unique, it breaks new ground, in the extent to which it opens the door to prejudice, then closes it on appeal. In the interest of a fair trial, so precious to the life and liberty of the citizen, does it not call for the most careful consideration by this tribunal, through the granting of the Writ?

4. Is it Due Process for an Appellate Court to Refuse to Hear or Decide the Major Questions Submitted.

On this point we submit the following cases as illustrative of this position:

In *Griffin v. Ills.*, 351 U. S. 16, this Court held that a State Supreme Court denies due process in a criminal appeal when it fails to provide the impecunious appellant with a transcript of the record, pointing out that when the right of appeal exists, there must be no discrimination among those convicted of crime — all must be heard. On this point Mr. Justice Frankfurter said:

> "But neither the fact that a State may deny the right of appeal altogether . . . sanctions differentions by a State that have no relation to a rational

> policy of criminal appeal or authorize the imposition of conditions that offend the deepest presuppositions of our society."

To refuse to hear an appellant's objections to the admission and consideration of so great a volume of highly prejudicial evidence, which the trial judge admitted he took into consideration was, in fact, just as fatal to Petitioner's appeal as was the failure of the State to furnish Griffin with a transcript.

Again in *Chessman v. Teats*, 345 U. S. 156, where this Court reversed the conviction of the appellant because the transcript on appeal was settled in his absence, Mr. Justice Harlan put this failure of the State of California to accord a hearing to appellant in these terms:

> "The proponent before this Court is not the Petitioner, but the Constitution of the United States."

By the failure of the State Supreme Court of Washington to accord Petitioner a hearing on assigned errors so fundamental and so grave, is not this statement of the rule equally applicable here?

In *Napue v. Ills.*, 360 U. S. 264, where, in a state trial, the prosecutor failed to correct the testimony of a witness known by him to be false, though it went only to the credibility of the witness, this Court held that the conviction violated due process. The trial error was far less critical and fundamental, it seems to us, than this denial of a right to be heard respecting the

highly prejudicial evidence, used with deadly effect to blacken this Petitioner, yet without giving him a chance to be heard in rebuttal of it.

That such an assumption of the trial judge's infallibility in disregarding prejudicial evidence is a mere legal fiction, under the circumstances of this case, is well expressed by Judge Sanborn in *Donnelly v. N.L.R.B.*, 123 F. 2d, 215, 224:

> "Lawyers and judges frequently differ as to the admissibility of evidence."

In the light of this well-known frequency of difference, can a court apply so recklessly as here a rule of infallible correction of a trial judge in a criminal case of such gravity?

For we bear in mind that for a man nearly 80 years old, a sentence of 15 years (App. A, p. 27a) is, in effect, a life sentence, with all the tragedy this implies to him, his family and friends. Under these circumstances, a trial freed of prejudicial error is vital.

We therefore venture to recall the language of *Lisenba v. California*, 314 U. S. 219, 236, which this Court quoted with approval in *Lyons v. Oklahoma*, 322 U. S. 596, as follows:

> "The 14th amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of 'that funda-

> mental fairness essential to the very conduct of justice, and in a way that necessarily prevents a fair trial.' "

And, to much the same effect, we quote Mr. Justice Frankfurter, in *Irvin v. Dowd*, 366 U. S. 717, 729, as follows:

> "One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure."

We appeal to this Court to give this Petitioner the fair trial, restricted to the crime of which he is accused, not to thrust into his trial evidence of alleged misdoings in which he had no part.

5. Prosecutor's Violation of Grand Jury Secrecy by his Wholesale Use of Evidence Taken Before the Grand Jury.

We apply yet another due process test to this trial of Petitioner. In the case of *In re Oliver*, 333 U. S. 257, 265, in defining the scope of the grand jury, this Court said:

> "Grand juries investigate . . . They do not try and they do not convict. When their work is finished by the return of an indictment, it cannot be used as evidence against the person indicted."

In flagrant disregard of this basic principle of grand jury proceedings, the trial of this case was opened with the placing of the court reporter on the stand, and

reading into the record, not merely the testimony of the Petitioner that may have been relevant to the charge of perjury, but his entire testimony before the grand jury on November 5, 1958, his first appearance, during which Petitioner was asked of a great many matters pertaining to the suspicions of the grand jury that there was misconduct between the contractor and the manager of the PUD (R. pp. 68-103, 116-153, 165-203). Somewhat later in the trial Petitioner's entire testimony, given on his second appearance before the grand jury (R. pp. 228-303) was also thrust into the record, over the objections of Petitioner's counsel. (Numerous objections were made, but they are best summarized at R. pp. 159A, 161-2, 164).

The special vice of this wholesale dumping into the record of all of Petitioner's testimony on both occasions, though the second appearance, in particular, had nothing whatever to do with the perjury charges, while at the same time Petitioner's counsel was excluded from any inspection of the grand jury's proceedings and minutes relating to Petitioner's testimony (R. p. 42) is that this action by the trial judge opened the door wide for this huge volume of prejudicial evidence concerning "Agencia Industrial," Extra Work Orders, Lynch-McClintock Co., and the $87,500 transaction between the contractor and McLean, summarized in Appendix B, none of which had anything whatever to do with Petitioner's alleged perjury, as is demonstrated by the summary of these transactions attached in Appendix B.

In short, was it due process to violate grand jury secrecy to aid the prosecution, and at the same time insist on that secrecy to hamstring the defense?

CONCLUSION

For the foregoing we respectfully submit that this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A:

Opinion of the Supreme Court of the State of Washington Which Also Contains the Opinion of the Trial Judge.

DONWORTH, Judge.

Appellant was found guilty as charged in five counts of an indictment charging him with first-degree perjury in his testimony before a grand jury which had been called in Grant County. He waived a jury trial and was tried before a visiting judge, who imposed a sentence of not more than 15 years' imprisonment in the state penitentiary for each count (to run concurrently), and payment of the costs of prosecution.

The trial of the case consumed two weeks. The record is voluminous. The statement of facts consists of more than 1200 pages; over 100 exhibits were offered in evidence; and the transcript contains 280 pages of motions, affidavits, findings of fact, and court orders.

In presenting this appeal from his judgment and sentence, appellant contends that the trial court erred to his prejudice in 123 instances, each of which is specifically described in his assignments of error. He asks that this case be dismissed by this court, or, in the alternative, that he be granted a new trial.

To give a detailed resume of all the oral testimony and documentary evidence admitted at the trial, as

well as the purport of the many pretrial and post-trial motions and similar proceedings, would extend this opinion beyond all reasonable bounds. We have made a thorough examination of the entire record in the light of the extensive arguments contained in the briefs and presented orally to this court by counsel. We, therefore, will endeavor to state as succinctly as possible the factual background of appellant's indictment and conviction.

The grand jury was impaneled August 25, 1958, and proceeded to investigate certain alleged criminal activities arising in connection with the construction of the Priest Rapids Dam on the Columbia River by Public Utility District No. 2 of Grant County (herein referred to as the PUD). The prime contractor was Merritt, Chapman and Scott Corporation (herein referred to as MCS). There had been rumors of substantial gratituties and payments of money made by MCS to officers of the PUD (including its manager, Glenn A. Smothers).

In July, 1956, MCS was awarded the contract for the construction of the Priest Rapids Dam. The prime contractor's compensation was approximately $91,000,000.

About two weeks later, MCS paid the McLean corporation $87,500. This corporation was controlled by the partners of a certain Washington, D.C., law firm. Several of the partners were close friends of appellant

of many years' standing. During 1957 and early 1958, McLean gave appellant six checks totalling $16,193.49. On the receipt of each check, appellant gave his check for one half thereof to Glen A. Smothers, the manager of the PUD. Each check bore a notation "Consultation."

In addition, appellant gave Smothers a check for one half of the amount of $6,500 which he received from the Shoup Voting Machine Company (according to appellant's testimony) as a finder's fee for locating prospective business in Vancouver, Washington, and Portland, Oregon.

Also, appellant sold to Smothers, for $250, one half interest in his stock in the Dominican corporation, hereinafter referred to. Upon the sale of it, he paid Smothers $2,350.

The total amount of the checks given by appellant to Smothers was approximately $13,700.

Appellant voluntarily appeared before the grand jury on November 5, 1958, was duly sworn, and testified. His testimony on that day related chiefly to the receipt of the checks referred to above and to his payments of one half to Smothers. (The indictment charged him with perjury with respect to some of his testimony relating to these transaction.) Prior to his appearance, approximately 30 other witnesses had testified before the grand jury.

Appellant again testified before the grand jury on March 13, 1959. In July 1959, at his request, his deposi-

tion was taken by the prosecuting attorney in the presence of his counsel. This was submitted to the grand jury at appellant's request.

August 27, 1959, the grand jury returned an indictment charging appellant with first-degree perjury in five counts. They read as follows:

"COUNT I.

"That the said defendant, Frank T. Bell, in the County of Grant, State of Washington, was called as a witness before this Grand Jury to testify in a hearing, inquiry and investigation then pending before this Grand Jury, before which Grand Jury, in which hearing, inquiry and investigation, an oath might lawfully be administered, and that an oath was lawfully administered to the said defendant, Frank T. Bell, by the foreman of the Grand Jury who was duly and lawfully authorized so to do, and after the defendant, Frank T. Bell, was so duly sworn before this Grand Jury and in said hearing, investigation and inquiry, as aforesaid, he, the said defendant, Frank T. Bell, did testify before said Grand Jury on November 5, 1958, and the said defendant, Frank T. Bell, did then and there in said hearing, inquiry and investigation, as aforesaid, unlawfully, corruptly, knowingly and contrary to said oath, testify and sweay as true the following material matters pertaining to the disbursement and considerations of sums of money to and from the defendant, Frank T. Bell, and the disbursement of sums of money by said defendant, Frand T. Bell, to one Glenn Smothers during 1956 through 1958, said Glenn Smothers being, during said dates, a public officer of Grant County, State of Washington, and pertaining to the employment of said defendant Frank T. Bell, the terms of said employment, the manner and circumstances in which said

Frank T. Bell acquired said employment, and the manner in which said defendant, Frank T. Bell, would be compensated by said employer, the McLean Finance and Investment Company, also known as McLean Development Company and McLean Finance Corporation (Company) and McLean Engineering Company and the receipts and attendant circumstances in which sums of money were received from said McLean Finance and Investment Company, also known as McLean Development Company and McLean Finance Corporation (Company) and McLean Engineering Company by the said defendant, Frank T. Bell, for employment compensation of the said Frank T. Bell, during the years 1956 to 1958, in substance and effect as follows, to-wit:

"That Lewis M. Scott contacted the defendant, Frank T. Bell, and procured employment for said Frank T. Bell, with the McLean Finance and Investment Company of New York:
"WHEREAS, IN TRUTH AND IN FACT Lewis M. Scott never contacted the defendant Frank T. Bell for employment with the McLean Finance and Investment Company of New York and never procured employment for said defendant, Frank T. Bell, with the McLean Finance and Investment Company of New York.

"Contrary to the Revised Code of the State of Washington 9.72.010, the statute in such case made and provided, and against the peace and dignity of the State of Washington.

"COUNT II. [Preamble the same as Count I, omitted].

"That Lewis M. Scott, acting for the McLean Finance and Investment Company of New York, directed Frank T. Bell to investigate a project in Juneau, Alaska, and to make a report on said project for said Company;

"WHEREAS, IN TRUTH AND IN FACT Lewis M. Scott was never an agent, employee, stockholder, officer or director of the McLean Finance and Investment Company of New York and never acted for the McLean Finance and Investment Company of New York and never directed the defendant, Frank T. Bell, to investigate a project in Juneau, Alaska, and never requested the defendant, Frank T. Bell, to make a report on said project for the McLean Finance and Investment Company of New York. * * *

"COUNT III [Preamble, the same as Count I, omitted]

"That the defendant, Frank T. Bell, called Lewis M. Scott and arrived at a determination of the defendant, Frank T. Bell's compensation for said defendant, Frank T. Bell's work involving the investigation of a project in Juneau, Alaska, and that said compensation was agreed upon by Lewis M. Scott, for and on behalf of the McLean Finance and Investment Company of New York, to be in the sum of $5,568.49;

"WHEREAS, IN TRUTH AND IN FACT the defendant, Frank T. Bell, never called Lewis M. Scott to arrive at a determination of the amount of defendant, Frank T. Bell's compensation for said defendant, Frank T. Bell's work involving the investigation of said project in Juneau, Alaska, and Lewis M. Scott never agreed that compensation should be paid to said defendant, Frank T. Bell, in the amount of the sum of $5,568.49 for and on behalf of the McLean Finance and Investment Company of New York, * * *

"COUNT IV. That said defendant, Frank T. Bell, in the County of Grant, State of Washington, was called as a witness before this Grand Jury to testify in a hearing, inquiry and invstiga-

tion then pending before this Grand Jury, before which Grand Jury in which hearing, inquiry and investigation, an oath might lawfully be administered, and that an oath was lawfully administered to the said defendant, Frank T. Bell, by the foreman of the Grand Jury, who was duly and lawfully authorized so to do, and after the said defendant, Frank T. Bell, was so duly sworn before this Grand Jury and in said hearing, investigation and inquiry as aforesaid, he the said defendant, Frank T. Bell, did testify before said Grand Jury on November 5, 1958, and the said defendant, Frank T. Bell, did then and there in said hearing, inquiry and investigation, as aforesaid, unlawfully, feloniously, willfully, corruptly, knowingly and contrary to said oath, testify and swear as true the following material matters pertaining to Frank T. Bell's employment or activities for the Shoup Voting Machine Company and the receipt and disbursement of moneys to a public official, to-wit: one Glenn Smothers, during which time the said Glenn Smothers was the manager of the Public Utility District No. 2 of Grant County, Washington, and the receipt of monies by the said defendant, Frank T. Bell, during the years 1956 through 1958, in substance and in effect as follows, to-wit:

"That the said defendant, Frank T. Bell, received monies from the Shoup Voting Machine Company, as a finder's fee;

"WHEREAS, IN TRUTH AND IN FACT, the said defendant, Frank T. Bell, never received any monies from the Shoup Voting Machine Company as a finder's fee, * * *

"COUNT V. [Preamble, same as Count IV, omitted]

"That the said defendant, Frank T. Bell, as a result of his efforts from the sale of Shoup Voting

Machines in Clark County, Washington, and in Portland, Oregon, received a commission in the amount of $6,500.00, the same being based on a percentage of the sales price of Shoup Voting Machines sold in Clark County, Washington and Portland, Oregon;

"WHEREAS, IN TRUTH AND IN FACT, the sum of $6,500.00 was not paid by the Shoup Voting Machine Company to the said defendant, Frank T. Bell, as a percentage commission of the results of the sales of any Shoup Voting Machines, sold in Clark County, Washington, and Portland, Oregon; * * *."

To all of these counts appellant pleaded not guilty.

At this point, before discussing appellant's assignments of error, it will be helpful to an understanding of the major issues to read the trial court's oral decision rendered at the close of the taking of evidence and after hearing the arguments of counsel. The trial judge stated the reasons for his decision as follows:

"THE COURT: The defendant in this case is charged, by an Indictment, issued by the Grand Jury, which was duly and regularly called in this community. The Indictment was issued on August 27th, 1959, and has charged the defendant in this case with the crime of perjury in the first degree, five counts.

"The defendant in this case waived a jury trial and the case was tried to the Court.

"Whereas a jury, in rendering its verdict, is required in law to simply state guilty or not guilty, I believe it is the duty of the Court to give its reasons for the conclusion which it has reached.

"The crime charged is perjury in the first degree. Counsel for the State and counsel for the defendant have called attention to the Court that in some respects the crime of perjury is unique, and that it is considered to be one of the most difficult of proof. And, indeed, it is the law that, as distinguished from every other major crime, with the sole exception of treason, the law has imposed upon the prosecution an additional burden, which it does not have to assume with the ordinary felony.

"In any case in which a defendant is charged with crime, because he is an American Citizen, he is entitled to a presumption of innocence, which he carries with him until the jury renders its verdict or the Court renders its judgment.

"The prosecution must meet and accept the burden of establishing an accused's guilt, beyond a reasonable doubt. Now, this is generally recognized by scholars as being a qualitative test. But in addition to this qualitative test the law says that with perjury we have another test, which legal scholars sometimes refer to as a quantitative test, and that is that in addition to the normal burden the prosecution must produce two credible witnesses who will contradict the accused or if not two, one and other credible evidence to support the contradicting witness.

"Now, this unusual rule, which is somewhat of an anachronism in our legal system, has an interesting historical background, which is not particularly pertinent here, but I think it does have a bearing upon the problems which confronts the Court in this case and I will touch upon it briefly.

"The old Roman Law relied largely upon numerical numbers; disputes were often settled in those courts by the mere balance of numbers of

witnesses who would swear for one side of the other. Some vestiges of that Roman concept carried over into our early Anglo-Saxon law and found their way into the ecclesiastical law, which was a part of the early beginning of the Anglo-Saxon system.

"In those primitive Anglo-Saxon days various ways to find the truth were tried. There was trial by combat, which was eventually abandoned, as it should have been, as not being a proper way to find the truth or achieve justice. And then there was the trial by ordeal, where a person was required to thrust his hand into boiling water or his foot on hot burning coals, and that was eventually abandoned as a primitive system.

"The next step was the concept of the oath, and judgments were rendered by what were called in those days by compurgators, people who would swear to matters that were in dispute, and as a carry over from the Roman system in the early beginning the idea was that the side that had the most swearers should win. The theory was that if a man stood up and laid his hand on the Bible and swore before God that he was going to tell the truth, the whole truth and nothing but the truth, that if he didn't he would be instantly struck down. Apparently that idea was prevalent enough that the judicial system for a good many years was based upon that concept. But that idea was abandoned too with more enlightenment.

"Eventually the oath was recognized as a device which usually could be relied upon, because usually honest men and honorable men told the truth, but it was learned, of course, that every man who swore to tell the truth was not always honorable or honest; and other means of testing credibility were devised, such as cross examination and the right to counsel. But as the common law broke away

from the old system of compurgators or witnesses, because of a historical accident, some scholars believe, the concept still clung to the crime of perjury. The theory being, because of the peculiar nature of the crime, the accused having been charged with swearing falsely, that there had to be at least one swearing to balance his swearing so that there was a balance to start with. But, other scholars have concluded that the reason that this apparent anachronism still remains in our law is another one, which has more meaning to us, and that is that the oath is so important to our system of jurisprudence that the law should give some assurance to a person who testifies that he will not be persecuted or harassed, after he has given his testimony, by persons who may have an ulterior motive for doing so. The theory is that when he comes into court or some other tribunal, he should do so with the confidence that it is unlikely that he would have to suffer the difficulties which would obtain were he charged with perjury.

"Now, I have taken this long to mention this because of the peculiar unusual problems which is presented by the peculiar circumstances of this case.

"In order to meet this quantitative test which the law requires, the State in this case has had to call two witnesses to contradict the defendant's testimony, each of whom has professed, under oath, to be a friend of the defendant and to hold him in highest regard, and each of whom has likewise been designated by the defendant as his good friend. The State has been confronted with this additional unusual problem in this case and that is the direction or focus of all the circumstantial evidence and inferences which it has presented to the Grand Jury, and which I will touch upon in a moment, suggests that it is possible, if not probable, that the defendant and the two witnesses upon

whom they rely are all engaged in a conspiracy. The ultimate objective of which was to funnel bribery money from the prime contractor, Merritt Chapman & Scott, to the general manager of the PUD, Mr. Glenn Smothers.

"Now, the alleged perjured testimony in this case was presented before a Grand Jury. That Grand Jury was called, the record shows, after due deliberation by the judges of this county, because there was a public outcry, public concern of evidence of lavish gifts being bestowed upon the manager of the PUD by the prime contractor, and because of differences of opinion which arose between that manager and its general counsel, and because its general counsel, Mr. Washington, had concluded and so stated that he believed that the general manager was performing illegal acts which probably could result in costs to the PUD of vast excessive sums of money. Specifically, Mr. Washington criticized Extra Work Order No. 6, which was a negotiated contract between the PUD and the general contractor to construct fish facilities for a cost which ran into the millions of dollars.

"Now, as I stated in ruling upon some of the proffered evidence of the defendant; it is not my function in this case to decide whether or not Mr. Washington was right in his analysis and conclusions as to these actions. The important matter is that the Grand Jury was told that this was what it was to investigate, and it was told this by the presiding judge of this county in his charge to the jury.

"Now, the Grand Jury as used in state courts is also a part of our judicial system which is in some ways old fashioned; I think that is not a very good word, but a better one doesn't occur to me at the time. But, it is true that in our country the Grand Jury is the ultimate weapon, if I can use that

phrase, of a free people to protect themselves from dishonesty and corruption and tyranny by their public officials. As the judge in this case cautioned the Grand Jury, they have terrible powers and they should use their powers with discretion. The Grand Jury has the right, which the prosecuting attorney does not have, and an important right in instances where the problems are of great magnitude and involve public officials, and that is the right of subpoena of witnesses and the right to require that they appear before the Grand Jury and testify truthfully under oath.

"This is the law of this State and generally of this country. That any reasonable inquiry made or information sought by a Grand Jury engaged in investigating alleged crimes is entitled to the most open and candid respect and if a false answer or information given tends in any manner to hinder or delay the inquiry, it is a material matter to that inquiry.

"I come now to a brief analysis of the evidence in this case which I think is material to the decision which I have reached.

"It is conceded by all counsel that there are basically three elements to the crime charged. The State must prove, first, that the testimony was false, it must prove, secondly, that it was given willfully and unlawfully and feloniously, and it must prove, thirdly, that the false testimony was material.

"It is my considered opinion that there is no question but the testimony in this case, as charged in each of these five Courts, was false. And, in my opinion there is no question but what it was willfully false. There has been a suggestion made that the defendant was confused or that he was an

old man and that he was, perhaps, abandoned by his co-conspirators and as it was, 'thrown to the dogs.'

"As I stated in ruling early in the case, the only fair way to analyze testimony in a charge of this nature is to read it all so that it can not be read out of context, and I have read and re-read the testimony in this case carefully, and it is my considered opinion that the defendant was not confused, that he was evasive and that he was attempting to confuse, rather than giving testimony which was the result of his own confusion. I am convinced that the evidence overwhelmingly establishes that his false testimony was willful and that it was done for the purpose of misleading and deceiving this Grand Jury.

"As I read the testimony I could sympathize with the Grand jurors and I would subscribe to their comments that the story that he was telling them was unbelievable, almost an insult to their intelligence.

"Now, we come to the question which has been the subject of the most intensive attack by the defense, as I have intepreted it, and that is as to the materiality. It must be recognized here that the test is not did the false testimony hinder or delay, the test is did it tend to hinder or delay. In my considered opinion the evidence in this case establishes not only that it tended to hinder or delay, but that it in fact did hinder and delay.

"Much argument has been made that what difference did it make; supposing the defendant had testified that he was paid for being a public relations expert and not a finder's fee or a commission? Before I answer the question I digress to make this observation. As I have carefully analyzed the testimony concerning Counts IV and V, which

concern the so called finder's fee, read in their entirety it was apparent that on November the 5th, 1958, the day upon which we must analyze this testimony, the defendant made it clear that what he was receiving was — I don't care whether you call it a commission or a fee — he was receiving something for something sold, and; indeed, he had to tell it that way otherwise his testimony as to paying Mr. Smothers half of it made no sense to the Grand Jury. The whole import of his testimony in that regard was that he was paying Mr. Smothers because Mr. Smothers found the buyers which enabled him to collect his commissions.

"But, to answer the question that I propounded a moment ago, when the defense asked what difference does it make, it makes this difference if no other: I think it is well to recall what the nature of an oath is. The oath has basically two parts to it, an affirmative part and a negative part. When a man swears that he will tell nothing but the truth, he swears that he will not give false information. But, on the other hand, when he swears that he will tell the truth and the whole truth, he swears that he will give true information. If the defendant had given true information in this case the work of the Grand Jury would have been materially lessened.

"Now, finally I alluded to the reason that I dwelled upon the peculiar problem of the so called quantitative evidence and the necessity that there be another witness or two and the peculiar problem presented by the circumstances of this case which have forced the State to rely upon the testimony of two men who, their evidence suggests, are fellow conspirators. The basic problem of a trier of the fact is to weigh credibility of witnesses and any judge or jury soon finds that there are no mechanical rules which help in that task. You cannot decide, well, this witness testified falsely in

answer to this question and therefore everything else that he said was false, nor can you conclude that this witness answered truthfuly as to this question and therefore every other answer that he gave was true. That is the great and the difficult problem and the awful responsibility that any juror or any judge undertakes when he undertakes to be a judge of his fellow man.

"Now; I do not believe everything that Mr Rosenbaum said, and I do not believe everything that Mr. Schott said. I am highly suspicious of Mr. Rosenbaum. I thought Mr. Rosenbaum was far from candid. Mr. Rosenbaum couched most of his answers with the phrase, 'Not as far as I know.', and he answered questions which he should have known with that same evasive phrase. I agree with the prosecution that the circumstances concerning the obtaining of the $87,000 fee, for what I am unable to understad, whether it was legal advise that an engineering company was giving Meritt-Chapman & Scott, or not. I agree with the prosecution that the circumstances as explained in this courtroom are highly suspicious. I agree with the prosecution that the circumstances of giving of the diamond drilling contract to the so called McLean Engineering Company are even more suspicious, and I agree with the prosecution that the fact that one-half of the $6,500 fee in connection with the voting machines, one-half of which found its way into Mr. Smothers pocket through a corporation which was formerly wholly owned by Merritt-Chapman & Scott and which is now headed by a former vice president of that company, is also highly suspicious. Those were the suspicions that were conveyed to this Grand Jury who were attempting to undertake the responsibility that the citizens of this community had placed upon it. And this Grand Jury was entitled to fair, honest,

candid and frank answers from the defendant in this case, and in my opinion they did not receive such answers.

"My conclusion is that the State has established the guilt of this defendant in every Count, beyond a reasonable doubt.

"This Court will stand adjourned."

Before signing the judgment and sentence (April 18, 1960), the trial court (March 23, 1960) had entered detailed findings of fact which are set out in twelve pages of the transcript. Error is claimed in the entry of certain portions of these findings in appellant's assignments Nos. 96 to 120, inclusive.

Appellant took the stand in his defense and denied that he had testified falsely as to the matters described in the five counts of the indictment. The state's two principal witnesses had previously testified to the contrary as to the correctness of appellant's testimony before the grand jury.

The trial court, in a criminal case (where a jury has been waived), has the duty of evaluating the testimony of the various witnesses where there is a conflict and of making findings of fact. Cf. *State v. Morey*, 55 Wash. 2d 530, 348 P. 2d 978 (1960). As in a civil case, our function is to determine whether there was substantial evidence to support the findings which are challenged in appellant's assignments of error. If so, we must accept the findings as verities. *Ostigny v. A.*

F. Franke Construction, Inc., 55 Wash. 2d 350, 347 P. 2d 1049 (1959); *Stewart v. Smith*, 55 Wash. 2d 563, 348 P. 2d 970 (1960).

In our discussion of appellant's 123 assignments of error, we shall group them, for the most part, in the same manner as they are argued in appellant's brief. In considering these assignments, we have in mind the rule that those that are not supported by argument in appellant's brief will not be considered. See *Fulton v. Fulton*, 157 Wash. Dec. 227, 357 P. 2d 169 (1960), and cases cited therein.

Assignments of Error Nos. 1, 6, and 7:

Following the citation of the statutory provisions defining the crime of first-degree perjury and the qualitative and quantitative proof required to support a conviction thereof, and the citation of authorities relative thereto, appellant contends:

1. That the Grant County Superior Court erred in extending the term of the grand jury from 60 days to an indefinite period, because it lacked constitutional or statutory authority to do so. (We are not informed as to the basis for this alleged lack of authority and need not consider this contention.)

2. That it was error to deny appellant's motions to set aside and to quash the indictment. Apparently, the common thread to the three arguments advanced in

support of the above proposition is that the grand jury had no authority to issue an indictment against appellant.

Appellant next contends that the court abused its discretion in the selection of the grand jury in that the court did not adhere to uniform standards, and that the standards used were not uniformly applied, but that some jurors were arbitrarily chosen or excused. It is argued that certain named jurors had preconceived opinions on matters to be investigated and expressed them in the presence of other prospective jurors.

It should be borne in mind that appellant was not referred to, either by name or by the remotest implication, in the proceedings for the impanelment of the grand jury. There is nothing in the record of these proceedings to indicate that the presiding judge, the prosecuting attorney, or the prospective jurors had at that time the slightest idea that appellant had any connection with any of the matters to be investigated. Under these circumstances, we do not think that appellant has any standing to complain about the selection of the grand jurors, unless he can show that the provisions of RCW 10.28.030 and .040 were applicable to this impanelment. Since there is nothing in the record to indicate that appellant was, at the time that the grand jury was being impaneled, under the slightest suspicion of being a person whose conduct was to be

scrutinized by the grand jury, he may not be heard to attack the court's exercise of its discretion in the selection of the grand jurors.

The next alleged error relates to the validity of the appointment of Mr. Riner E. Deglow, a resident of Spokane, who is duly admitted to practice law in this state, as a special deputy prosecuting attorney of Grant County. Mr. Deglow first appeared before the grand jury in his capacity as special deputy on April 6, 1959 (some eight months after it had been impaneled and five month after appellant had testified before it the first time.)

It is argued that Mr. Deglow was not eligible for appointment because he was a nonresident of Grant County. The basis of this contention is that, prior to 1959, the pertinent statute (RCW 36.27.040) provided that the prosecuting attorney's choice of such deputy should be limited to practicing lawyers residing in his own county. In 1959, the legislature amended the statute by eliminating this restriction and permitting the appointment of any resident of this state who was admitted to practice as attorney before the courts of this state. Section 2 of the amendatory act contained an emergency clause, reading:

> "This act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect immediately." Laws of 1959, chapter 30, §2.

This act was signed by the governor February 18, 1959, and became effective immediatly, unless, as appellant argues, the emergency clause was invalid.

In this connection, appellant cites several of our decisions in which we have considered the validity of emergency clauses in statutes. Our attention is called to *State ex. rel. Pennock v. Coe*, 42 Wash. 2d 569, 257 P. 2d 190 (1953), in which this court (*en banc*) reviewed our former cases on this subject. It is to be noted that this court has never before been asked to pass on the validity of an emergency clause except in a proceeding instituted by a person or group of persons who were attempting to exercise the constitutional right of referendum under paragraph (b) of the seventh amendment to our state constitution.

In the present case, there is no showing that appellant or any one else had ever attempted to file a referendum petition with the secretary of state. Appellant has no standing to attack the good faith of the legislature in attaching an emergency clause to chapter 30 of the Laws of 1959, because he has no vested interest in any particular form of criminal procedure. Furthermore, whether a lawyer from Spokane County or from Grant County was appointed a special deputy prosecuting attorney (if his appointment had been validly authorized by the legislature) is no concern of appellant's because he has not shown that he was prejudiced in any way by Mr. Deglow's appointment.

His only concern is whether an unauthorized person was present in the grand jury room on and after April 6, 1959. Even if the emergency clause were invalid, the 1959 act would have become effective June 10, 1959, which was several months before his indictment. Hence, in any event, Mr. Deglow would have had authority to be in the grand jury room in June, if not in April. The practical effect on appellant's rights resulting from the legislature's advancing the date of Mr. Deglow's eligibility to act as a special prosecutor seems to us to be negligible. Even assuming that appellant had any standing to attack the validity of the emergency clause, the burden would be on him to show bad faith on the part of the legislature in declaring an emergency. *State ex rel Pennock v. Coe, supra.* Here we have only appellant's bald assertion that no emergency in fact existed.

We hold that, under the circumstances, this contention is not available to appellant and, even if it were, it has no merit.

In his final argument supporting his theory that there was no authority to issue an indictment, appellant claims that the grand jury indictment is vitiated by the disclosure of a part of the Grant County grand jury proceedings to an assistant district attorney in New York.

The disclosure came about when the prosecuting attorney sought to have Robert B. Harvey, the pres-

ident of M C S, subpoenaed under the Uniform Witness Act (RCW 10.55) from New York to Grant County to appear before the grand jury. Harvey decided to contest the validity of the proceedings in the New York courts. This challenge had to be met, and the materiality of Harvey's testimony shown, or the New York court would be powerless to issue the subpoena. See *Application of Stamler*, 279 App. Div. 908, 111 N. Y. S. 2d 313. At that point, the prosecuting attorney of Grant County was faced with a choice — disclose a part of what had gone on before the grand jury, in order to give the New York assistant district attorney some facts showing materiality of Harvey's testimony, or abandon the Uniform Witness Act with regard to obtaining witnesses before the grand jury.

The Uniform Witness Act provides, by its terms, for the attendance of witnesses before grand jury investigations. That statute was enacted after the requirement for secrecy of grand jury proceedings had long been part of our law. If possible, the court must harmonize statutes relating to the same subject, and give effect to each. *State ex rel. Reed v. Spanaway Water District*, 38 Wash. 2d 393, 229 P. 2d 532 (1951), and *State v. Fairbanks*, 25 Wash. 2d 686, 171 P. 2d 845 (1946). Under these circumstances, we hold that the later act (Uniform Witness Act) provides authority for the disclosure made in this case.

However, even if the disclosure were unauthorized, appellant would have no grounds for setting aside the indictment, unless he could show that he was prejudiced by the disclosure. *United States v. Amazon Industrial Chemical Corp., D.C.*, 55 F. 2d 254, 261 (1931). Appellant has alleged no facts whatsoever to show any injury in any degree to any of his rights because of the prosecutor's action.

We find no merit in the contention that it was error not to set aside the indictment because of the disclosures that were made to the assistant district attorney in New York.

Therefore, all of the arguments by appellant in support of assignments of error Nos. 1, 6, and 7 have failed.

Assignments of error 3, 4, 5, 8, 9, and 10:

Appellant asserts that his motion to strike the indictment and his motion for a bill of particulars were erroneously denied.

We find no merit in this assignment because these matters were for the trial court to grant or deny in its discretion, and we cannot say that there was any abuse of its discretion. Appellant was furnished with a complete copy of his grand jury testimony well in advance of the trial. The indictment fully informed appellant as to the offense with which he was charged. Not only were the elements of perjury alleged, but the alleged

falsehoods were quoted verbatim. Furthermore, the indictment pointed out quite specifically the material business of the grand jury to which the statements related.

Assignment No. 2:

It is asserted that it was also error to deny appellant's motion to inspect the grand jury proceedings and minutes relating to his testimony. Appellant complains that the state took full advantage of the undefined language of the indictment and gained admission for a flood of evidence not specifically alleged therein nor logically by inference tending to prove any part of the offense charged. (As above stated, appellant was subsequently furnished all of his own testimony several months before trial.)

No argument is made in appellant's brief in support of this assignment beyond two page references to the statement of facts. Thus we are invited to search the record to see if we can find support for this assignment. In other similar situations, we have declined to do so. *Fulton v. Fulton*, 157 Wash. Dec. 227, 357 P. 2d 169 (1960), and cases cited therein.

Assignments 37, 38, and 49:

In these assignments, appellant complains concerning the testimony presented by the state and admitted over appellant's objection tending to show that appel-

lant's testimony tended to hinder and delay the grand jury's investigation. The foreman and three other members of the grand jury testified that the grand jury had concluded that additional investigation was necessitated because of Bell's testimony. The trial court correctly treated that as a statement of fact and not an opinion. These assignments have no merit.

Assignments 11, 13, 14, 15, 19, 20, and 29:

These assignments relate to a corporation known as Agencia Industrial which was incorporated under the laws of the Dominican Republic. Briefly stated, the testimony of appellant before the grand jury relating to this incident was that, in 1956, he by chance encountered a stranger who offered him some stock in this corporation for $500. He purchased the stock and sold a one-half interest in the "flyer" to Smothers for $250. "Later," he received a telephone call from a different stranger in Washington, D.C., to the effect that certain other stockholders, who wished to obtain control of the corporation, would pay appellant $5,000 for his stock. Accordingly, when he sold his stock for this sum he gave Smothers one half of the proceeds of the sale.

Appellant complains that his testimony before the grand jury pertaining to this transaction was read into the record at the trial over his objections, although it referred to a source of income not mentioned in the indictment and, also, that his motion to strike it was

denied. He further argues that the trial court relied on it in its oral decision.

The state points out in answer to this contention that appellant's check for $500, payable to the corporation, was admitted without objection, as was the check for $5,000, payable to appellant and purportedly endorsed by the stranger. At the trial, there was testimony that the endorsement was by Frank Rosenbaum, who was a partner in a law firm practicing in Washington, D.C., some of whose partners were incorporators and officers of the Dominican corporation. Several of them were personal friends of appellant of many years' standing. (These same persons also controlled McLean at that time, as pointed out previously.)

In the state's brief, it is contended that the Dominican corporation matter was introduced to show:

> "* * * (1) the materiality of the Grand Jury proceedings; (2) the nature of the defendant's testimony as an indication of wilfullness, and corruptness of intent and (3) scheme, design and plan, since it is obvious that the defendant was not truthful concerning this transaction.
>
> "To take certain statements out of context would deprive the trier of the fact of the opportunity to examine the defendant's testimony on November 5th as a whole. The State contends that an appraisal of the defendant's entire testimony as of that date could have probative value to determine whether or not any of the defendant's testimony on that date was wilful, corrupt, felonious, material and false:

"The defendant's testimony on November 7th, including Agencia, was primarily concerned with payments of money, which he split with Smothers, during the MCS contract, which except for the voting machine transaction, all had a connection with the Rosenbaums, who, in turn, had a connection with MCS concerning the Priest Rapids Project."

For the reasons given by the state, we find no merit in these assignments.

Furthermore, if the evidence referred to were not material, the following portion of our opinion in *State ex rel. Cummings v. Kinne*, 8 Wash. 2d 1, 111 P. 2d 222 (1941), would be applicable to this case:

"Appellant assigns error upon the admission of considerable evidence, over her objection. As to most of this evidence, she contends that it related to her habits and conduct at a period too remote from the time of trial to render such evidence material. In such a case as this, such evidence is admissible, the weight which the court should attach thereto to be determined in the exercise of sound judicial discretion. *It should be assumed that any evidence which was introduced concerning immaterial matters was disregarded by the trial court*, and most of the evidence, whether oral or by way of exhibits, of the admission of which appellant complains, was properly admitted. Of course, this court disregards any evidence which was improperly admitted. We find no error in connection with these assignments of error."
(emphasis supplied)

Assignments 2 and 16:

Under these two assignments, appellant makes a general complaint that, while he was denied access to the grand jury proceedings, the state, on the vital issue of materiality, was allowed (over his objection that they were opinions, conclusions, hearsay, and not the best evidence) portions of the proceedings and testimony relative to the grand jury and its opinions.

Here, again, we are given references to the record, but are not favored with any argument in support of these assignments. As we said above regarding assignment No. 2, we must disregard such bare claims of error.

Assignment 21:

Appellant claims that the trial court erred in admitting his entire testimony of March 13, 1959, before the grand jury (which was not the basis of the perjury charge), on the theory that it showed subsequent inconsistent statements with his November 5, 1958, testimony, without requiring the state to point out the alleged inconsistent statements therein. He contends that this shifted to him the burden of explaining portions thereof which were not in issue before the grand jury when he first testified.

The state argues that appellant's entire testimony of March 13 1959, could have been of great significance

to the trier of the fact in understanding his alleged perjured testimony of November 5, 1958.

It seems to us that the admission of appellant's subsequent testimony was a matter within the trial court's discretion. As to the purpose for which the court gave it consideration, *we must assume that, in a trial to the court without a jury, the trial court did not consider immaterial evidence in reaching his decision. See Davis v. City of Seattle*, 134 Wash. 1, 235 P. 4, 44 A.L.R. 1490 (1925); *Kemp v. Putman*, 47 Wash. 2d 530, 288 P. 2d 837 (1955) (Emphasis supplied).

There was no reversible error in the admission or use of the testimony complained of.

Assignment 22:

This has reference to the trial court's refusal to strike all testimony concerning the McLean corporation, except the New York McLean corporation. We need not set out the history of this corporation and its changes in name other than stating that it was organized as a Delaware corporation with its principal office in Washington, D. C., at the same address as the law firm heretofore mentioned. Later, it qualified to do business in New York and moved its principal office to 341 Madison Avenue, New York City, and changed its name.

Appellant argues that since it was not mentioned in the indictment under its original name, no claim was

made by the state that appellant testified falsely regarding it while its principal office was in Washington, D.C.

The state's answer to this assignment is that the testimony was necessary in order that the court could understand the entire circumstances relating to the grand jury investigation and appellant's testimony of November 5, 1958.

Since the so-called New York McLean and the Washington McLean were one and the same corporation (regardless of who the officers and stockholders were), we cannot hold that the trial court abused its discretion in denying the motion to strike.

Assignment 12:

Error is claimed in the admission in evidence of the court's charge to the grand jury when it was convened on August 25, 1958, because it had no bearing on the ultimate issue before the trial, to wit, was appellant's false testimony material to the matters being investigated by the grand jury?

The court's charge contained the following:

> "It seems unnecessary to review the recent testimony heard before me, as Presiding Judge, requesting a grand jury investigation into the affairs of the Public Utility District of Grant County. The court does not wish to intimate in any way, as to whether or not you, as a grand jury, should

issue an indictment. That will be up to you after an investigation has been made; you have heard the testimony of witnesses and conferred with the Prosecuting Attorney.

"As I stated previously, by law you are required to visit the county jail and make your report as herein set forth. Outside of that, I suggest to you that the scope of your inquiry into fields other than the Public Utility District of Grant County, be largely restricted to those matters suggested as worthwhile by the Prosecuting Attorney, who is a skilled and experienced Attorney, and always available to you for advice. The court is also ready to consult with you on legal questions at any time.

"To completely investigate the Public Utility District of Grant County, may be beyond the endurance and energy of yourselves, the Prosecuting Attorney and his investigating staff. The financial burden of such a complete investigation may be beyond the resources of Grant County. I urge you to do all that you can within practical limitations, to ascertain the truth or falsity of these charges."

We think that the above-quoted portion of the charge had a pertinent bearing on the ultimate issue of materiality and that there was no prejudicial error in admitting the charge in evidence.

Assignments 74, 76, 98, 99, 100, 101, and 102:

Appellant contends that Findings of fact Nos. 6 through 10, inclusive, are based on the erroneous premise that Smothers "secretly" initiated the extra work order procedure.

In 1958, Mr. Nat Washington, who was then, and had been since 1951, general counsel for the PUD, wrote an opinion to the effect that the practice of the PUD entering into extra work orders with MCS (in excess of $5,000) without competitive bidding was illegal as being in violation of RCW 54.040.070.

Mr. Washington was the first witness before the grand jury. Appellant was furnished with a copy of Mr. Washington's testimony, but no effort was made to refute the fact that Mr. Washington expressed his legal opinion to the grand jury that the extra work orders without public bidding were illegal.

Appellant complains that Smothers did not secretly initiate this practice, but that the Harza Engineering Company did so. Appellant offered to prove this fact, but the trial court declined to receive it. This was not error, because the principal issue was not whether Smothers or Harza originated the practice or whether Mr. Washington's legal opinion was correct, but what Mr. Washington testified before the grand jury about his opinion on this subject.

The findings concerning which appellant complains did not contain what he claims they did. The court found that Mr. Washington had no knowledge concerning this matter until early 1958. The findings are confined solely to what testimony was submitted to the grand jury relative to extra work orders.

Assignments 3, 24, 25, 26, and 78:

These relate to the payment of $6,500 by the Shoup Voting Machine Company to appellant. Lewis M. Schott, president of the company, testified regarding this transaction. He testified that he had also testified before the grand jury to the same effect. The trial court did not abuse its discretion in refusing appellant's request for all of Schott's testimony before that body (at the time of the trial the grand jury was still in session), although the trial court's ruling was based on the theory that Schott was a personal friend of appellant's and had no adverse interest.

Assignment 27, 28, 33, 35, 39, 40, 41, 42, 43, 45, 46, 47, 48, and 85:

These relate principally to the Lynch-McClintock subcontract with MCS for drilling work at the dam site, which was obtained by McLean corporation. The latter received more than $100,000 from Lynch-McClintock for this service. This transaction is described in finding No. 27 (subparagraph F and G), and the evidence regarding it was admitted as bearing on the issue of materiality of appellant's testimony before the grand jury. While neither appellant nor the grand jury were aware of this transaction on November 5, 1958, there was no prejudicial error in admitting the evidence, because it was a subject which the grand

jury was interested in investigating. It is no defense that appellant did not know that his false statements were material.

The other claimed errors covered the above assignments do not require separate discussion. *As we have previously pointed out, where a case is tried to the court without a jury, it will be presumed that the trial judge disregards inadmissible testimony in reaching his decision* where there is competent testimony to sustain his findings. *Kemp v. Putnam, supra.* (emphasis supplied).

The remaining assignments, less 96 through 123:

All of these assignments, like several previously discussed, relate to the admission of evidence. Assignments 27, 28, 30, 31, and 32 all label Rosenbaum's testimony hearsay. Assignments 17, 18, 34, and 51 to 64, inclusive, are based on the argument that the testimony relating to English Electric was irrelevant, "clearly inadmissible," and prejudicial. Assignment 66 attached a hearsay irrelevant, and immaterial label to documentary proof of a $1 million extra work order. Appellant sought to support assignments 69, 70, 71, 77, 79-94, 87, and 88 by calling certain exhibits irrelevant, self-serving, and hearsay (the exhibits concerned work done by the prosecutor's office after November 5, 1958). In support of the other assignments under this heading, appellant goes so far as to challenge the credibility of a witness, assert that the appellant was confined to

the best evidence rule whereas the state was not, and complain about insufficiency of cross-examination allowed to appellant against a particular witness.

It would be possible to go through each of these assignments of error and show that none of those assertions are true, that the standards applied to both parties were entirely consistent, that each bit of challenged evidence would have been admissible even in a trial before a jury, and that the judge did not abuse his discretion in any single instance. However, it is unnecessary to go through such a labored process when the trial was to a court sitting without a jury.

In such a case, we must first consider the liberal admissibility policy which this state has adopted, which was first set forth in 1907, in the case of *Degginger v. Martin*, 48 Wash. 1, 92 P. 674 (1907):

> "The appellant has contended that the trial court erred in refusing to admit certain evidence offered by her. We find no prejudicial error in this regard, but in view of a new trial, we will suggest that, while the court in an action tried without a jury should reject all evidence clearly incompetent and immaterial, to avoid encumbering the record, yet a *liberal practice should be adopted in admitting evidence, so that this court, in the event of an appeal, will on a trial de novo have all material facts before it for consideration*, and thus avoid the necessity of the cause being remanded for the admission of material evidence, erroneously rejected." (emphasis supplied)

Not only do we encourage liberal admission of evidence in nonjury trials, but that policy is furthered by the presumption on appeal (which has been mentioned several times already) that:

> "* * * * Since there is no affirmative evidence to the contrary, *we must presume that the trial judge knowing the rules of evidence, did not consider matters which were inadmissible when making his findings. Kemp v. Putnam*, 47 Wash. 2d 530, 1955, 288 P. 2d 837; *Walker v. Herke*, 20 Wash. 2d 239, 1944, 147 P. 2d 255; *Whiting v. City of Seattle*, 144 Wash. 668, 1927, 258 P. 824." *Davis v. Sill*, 55 Wash. 2d 477, 480, 348 P. 2d 215. (emphasis supplied)

See also, *State v. Egan*, 48 Wash. 2d 304, 308, 293 P. 2d 399 (1956):

> "Where a case is heard by a judge without a jury, a new trial should not be granted for error in admission of evidence, if there remains substantial admissible evidence to support the findings, *unless it appears that the findings are based on the evidence which should have been excluded.* * * * " (emphasis supplied)

See, also, *State ex rel. Cummings v. Kinne*, *supra*, and *Davis v. City of Seattle*, *supra*.

In the present case there is no indication that any of the evidence was used for an improper purpose. We hold that there was no reversible error in the admission of evidence.

Assignments 95 to 120, inclusive:

All of these assignments challenge particular findings of fact. There is substantial admissible evidence in the record to support each of the findings of fact. Therefore, they will be treated as verities. *Stringfellow v. Stringfellow*, 56 Wash.2d 957, 350 P. 2d 1003, 353 P.2d 671 (1960); *In re Bailey's Estate*, 56 Wash. 2d 623, 354 P. 2d 920 (1960); *Gooden v. Hunter*, 56 Wash. 2d 617, 355 P. 2d 20 (1960); *Mack v. Eldorado Water District*, 56 Wash. 2d 584, 354 P. 2d 917 (1960).

Assignments 121 and 123, inclusive:

The last assignments of error attack the conclusions of law and the judgment of the trial court. The findings of fact support the conclusions of law and judgment.

There being no merit in any of the 123 assignments of error, we are of the opinion that appellant had a fair trial, and that the judgment is in all respects a proper one. The judgment of the trial court is hereby affirmed.

FINLEY, C. J., and MALLERY, HILL, WEAVER, ROSELLINI, OTT and FOSTER, JJ., concur.
HUNTER, J., not participating."

APPENDIX B

Synopsis of Inadmissible and Prejudicial Testimony.

Prefatory Explanation. In the opening statement of the prosecutor, the trial judge was advised that the grand jury inquiry extended to:

> "The reasons for certain gifts, gratuities, airplane trips, football games and all expense trips, paid to various county officials and to Mr. Glen Smothers of the Public Utility District by Merritt, Chapman & Scott [R. p. 5] . . . the facts will show that . . . various gifts and gratuities were made from the prime contractor, Merritt, Chapman & Scott, to Glen Smothers; among them was a $1,200 sterling silver tea set, and an all expense trip through Nevada to Los Angeles . . . an expensive watch and money compensation which the proof will show . . . [came] from Mr. Frank T. Bell, defendant." (R. p. 7).

Thus, from the very beginning of this trial, the stage was set for the introduction of testimony implicating Smothers as guilty of accepting bribes, without any chance of defending himself, followed by inferences that Petitioner participated in this alleged *bribery* and, therefore, should be found guilty of perjury.

No testimony was ever offered to connect the fees Petitioner received from McLean and from Shoup Voting Machine Company, which he divided equally with Smothers for engineering services and assistance,

but the record was nevertheless ballooned to tremendous porportions to create suspicion of under-the-table transactions, just as if Smothers and Bell were being tried together for bribery or for participation in a conspiracy to defraud the PUD. We present four typical episodes of this sort to show to what extravagant length the creation of a climate of suspicion of wrongdoing was carried.

These four may be designed as Agencia Industrial, Extra Work Orders, Lynch-McClintock Company, and $87,500 payment by Merritt, Chapman & Scott to McLean.

(1) AGENCIA INDUSTRIAL

Before the grand jury, on being asked about a check Petitioner had given to Smothers over two years earlier, in August, 1956, Petitioner explained that some months before he had met a citizen of the Dominican Republic in Washington, D.C., who had induced him to take a "flyer" in a corporation about to be formed, which would have an exclusive concession in the Dominican Republic for horse racing, slot machines and other sporting and gaming events. Accordingly, Petitioner gave a check for $500. Later, in April of 1956, talking to his good friend Smothers of this "flyer," Smothers, as Petitioner before him, saw elements of large profits in such an investment and asked Petitioner for a half interest in it, to which

Petitioner acceded, and, thereupon, Smothers gave Petitioner his check for $250. In August of 1956, Petitioner was called back to Washington where he met a man who was seeking to gain control of this nascent corporation and, after some dickering, paid Petitioner $5,000 for a surrender of this $500 investment. On coming home, Petitioner charged Smothers with one half of the $300 expenses of his trip and gave Smothers $2,350 as Smothers' share of the venture (R. pp. 165-173).

Primarily because Petitioner, with an old man's inability to remember names, could not recall the names of these two men, each of whom he had met only once some two or two and one half years earlier, members of the grand jury, their detective instincts aroused by earlier testimony of various transactions in which Smothers was involved, refused to believe Petitioner's account of this transaction, and this whole story thus told to the grand jury, including their refusal to believe this account (R. pp. 172-3), was dumped into the record of this trial (R. pp. 270, 294, 297).

This Agencia Industrial transaction had not the slightest connection with any one of the perjurious charges of the indictment. It was used solely to arouse the court's suspicions respecting Petitioner and Smothers. There was not a syllable of testimony offered to discredit the Agencia Industrial version given by Petitioner nor a trace to any other source of the money Petitioner paid to Smothers.

(2) "EXTRA WORK ORDERS"

Substantial time was spent in this trial introducing testimony of "Extra Work Orders" issued by Smothers to the contractors for this huge hydroelectric plant of the PUD (R. pp. 604-5, 615-624, 645-6), chiefly through the testimony of attorney Nat Washington of the Smothers-Washington feud. This testimony, introduced over Petitioner's objections (R. pp. 615-617-9), is an outstanding example of the extensive use of prejudicial evidence to make it appear that Petitioner was co-conspirator with Smothers. It cannot be claimed that Petitioner was in any way connected with these Extra Work Orders. They are simply the origin of the bitter feud between Washington as attorney for the PUD and of Smothers as its manager. Washington was the first witness before the grand jury (R. p. 622) and was brought in to make his charge that these "Extra Work Orders" were illegal and thus to condemn Smothers without a hearing. Whether Smothers used an allegedly illegal method to favor the contractor had nothing whatever to do with the perjury accusations against Petitioner (R. pp. 609-719, 769-777, 863-872).

Yet the trial judge thought so much of this testimony respecting the Extra Work Orders in helping him to reach a conclusion respecting Petitioner's alleged guilt that he devoted five of his Findings of Fact to this one transaction as follows:

The Court's Findings of Fact No. V recited that a grand jury had been called to investigate

> ". . . into the affairs of said Grant County Public Utility District No. 2, its officers, agents and employees to determine if any crime had been committed by said persons. That prior to November 5th, 1958, some 30 witnesses testified before secret proceedings of said Grand Jury. That evidence was submitted to said Grand Jury relating to gifts, gratuities, free transportation and payments of money to officers of said Public Utility District including Mr. Glenn A. Smothers, who was manager of said District and a public officer thereof by Merritt-Chapman & Scott Corporation."

Thereupon the following five Findings were devoted to the "Extra Work Orders" as follows:

> "VI. That testimony and evidence was presented to said Grand Jury prior to November 5, 1958, that the Prime Contractor, Merritt-Chapman & Scott Corporation, who were building Priest Rapids Dam, pursuant to a contract with said Public Utility District, had been furnishing labor and materials on an Extra Work Order Contract System to said Utility District. That this labor and materials, so furnished, were not provided by public bidding, in accordance with the provisions of R.C.W. 54.04.070. This Extra Work Order procedure was brought into existence by said Glenn A. Smothers during April 1957 to October, 1957. The procedure as set out in R.C.W. 54.04.070 was not complied with by the said Utility District as respects the said furnishing of labor and materials wth the said Prime Contractor, Merritt-Chapman & Scott Corporation, as respects several furnishings of labor and materials by Extra Work Orders, to and including the furnishing, by said contrac-

to, of certain fish facilities, to said Utility District; by Extra Work Order No. 6, in the sum of $1,003,783.00.

"VII. That the said Grand Jury, prior to November 5, 1958, was informed by witness, Nat Washington, the first witness who testified to said Grand Jury, formerly the legal Counsel for said Utility District during the years 1951 through the summer of 1958, that public bidding, as required by R.C.W. 54.04.070, had not been followed respecting Extra Work Order No. 6, and other Extra Work Orders. That said Utility District and Glenn A. Smothers, while he was acting as manager of said District, had not requested legal advice from the legal counsel for said Utility District, as respecting the legality of Extra Work Order No. 6, or any proposal for furnishing said fish facilities by mean other than compliance with R.C.W. 54.04.070. That said legal counsel did not know until the spring of 1958 that such an Extra Work Order System was in existence and so informed the Grand Jury, as to Extra Work Order No. 6 and other Work Orders. That he so informed the Grand Jury and also informed them that there was no statement, note or memorandum in the minutes of the said Public Utility District, as to Extra Work Order No. 6. That the Grand Jury was informed that Minutes of the said Public Utility District were required to be kept by law as regards the said Public Utility District's business and as a public record. That this procedure had not been followed in these respects.

"VIII. That witness Nat Washington also informed the Grand Jury before November 5, 1958, that it appeared that this Extra Work Order System for the furnishing of labor and materials, including Extra Work Order No. 6, was also unknown to the three commissioners of said Public Utility District, until after he discovered it in the

early spring of 1958, and subsequently informed them. That subsequently, the three commissioners ordered that two other Extra Work Orders be cancelled and that the furnishing of labor and materials be let by public bid as required by R. C. W. 54.04.070. That said Washington informed the Grand Jury that in his opinion, the said Utility District saved approximately the sum of $200,000 by cancelling said Extra Work Orders and requiring the furnishing of said labor and materials covered by said two orders, be furnished by public bidding in compliance with R.C.W. 54.04.070.

"IX. That the said Nat Washington, also, before November 5, 1958, informed the Grand Jury, that commencing in 1951, on more than one occasion, in response to several inquiries from Mr. Glenn A. Smothers, he had informed said Smothers and the Public Utility District, of his views legally, and the legal opinion of the Attorney General of the State of Washington, that all contracts of said Utility District for work and materials, in the absence of an emergency, had to be furnished in compliance with R.C.W. 54.04.070, to-wit: By Public Bidding for furnishing of labor or materials in excess of $5,000.00. That copies of said Nat Washington's legal opinions, and the opinions of the Attorney General of the State of Washington, supported by Case Decisions as set out in said opinions, were communicated and made known to the said Glenn A. Smothers, from the summer of 1951 to March of 1958 and prior to the initiation of the Extra Work Order System. That said opinions had also been communicated and made known to the then Public Utility District's Commissioners on said occasions.

"X. That said Nat Washington also testified to said Grand Jury prior to November 5, 1958, that nevertheless, and in defiance of said legal

opinions, the said Extra Work Order system was set up and put into operation, secretly by Glenn A. Smothers, then the manager of said Public Utilty District, from April of 1957, before discovery by said Nat Washington. That in consonance with said Extra Work Orders, said Prime Contractor of Priest Rapids Dam, furnished labor and materials in excess of the value of $100.00 and received said sum from said Public Utility District in payment for the furnishing of said labor and materials."

This evidence might have been admissible if this were an indictment charging a conspiracy to defraud the PUD, in which Petitioner, Smothers and others had been made defendants, but it so manifestly had nothing whatever to do with these charges of perjury that we are appalled at its introduction and seeming acceptance by the trial judge.

If the conduct of Smothers was questionable, Petitioner could not, by himself, defend him, so that only the prosecutor's claim of wrongdoing here gets an airing. Eeven when the appellant sought to show the innocence of Smothers by offering the testimony of Robert B. Jackson as resident engineer of Harza Engineering Company, a highly respected firm with a world-wide reputation for integrity and ability, to show that Harza, not Smothers, was responsible for the Extra Work Orders procedure, this testimony was objected to by the prosecutor and sustained by the trial judge so that these ugly inferences against Smothers and therefore against Petitioner stand wholly unexplained (R. pp. 866-7).

(3) LYNCH-McCLINTICK COMPANY.

Just as remote from this perjury charge as is the "Extra Work Orders" is the testimony concerning the Lynch-McClintock subcontract (R. pp. 431-434, 481-483, 514-530, 539, 542-545) introduced over repeated objections (R. pp. 522-537). Here the inference is left that the Lynch-McClintock Company, to get this subcontract, had to increase their price for it to allow McLean, an alleged affiliate of the contractor, to receive an undercover profit, presumably through connivance with manager Smothers, although there is no evidence to this effect. No attempt was made to show that Petitioner ever knew of this contract or of any part in it involving McLean (R. p. 522). Yet it was not only admitted but generally considered by the trial judge.

In speaking to justify the admissibility of this evidence, the Supreme Court of Washington in its opinion (App. A, p. 60a) stated that this "evidence was admitted as bearing on the issue of the materiality of appellant's testimony before the grand jury," but, far from using it for that purpose the trial judge has viewed it as evidence condemning Petitioner, saying in his Finding 27, subparagraphs (F) and (G):

> "That the Lynch-McClintock Diamond Drillers of Spokane and Seattle, Washington, were awarded a subcontract on the Priest Rapids Dam on the 18th of July, 1956, through the intervention of the aforementioned Eugene Meacham of the McLean

Engineering Corporation. Lynch-McClintock agreed to do the subcontract work for $832,865.00; Merritt-Chapman & Scott Corporation was to be paid by the Grant County P.U.D. $87,930.00. The ultimate subcontract between Lynch-McClintock and Merritt-Chapman & Scott was for $959,445.00. For services rendered by the McLean Corporation in obtaining the subcontract for Lynch-McClintock, Lynch-McClintock paid the McLean Corporation in excess of $100,000.00. The Lynch-McClintock subcontract was for over $100,000.00 more than what Lynch-McClintock's pre-bid proposal was to Merritt-Chapman & Scott Corporation."

"That all of Lynch-McClintock's negotiations for this sub-contract were handled through the McLean Engineering Corporation. Lynch-McClintock had no direct dealing with Merritt-Chapman & Scott concerning the prices Lynch-McClintock were to be paid for the sub-contract." (Tr. p. 200)

(4) $87,500 PAYMENT BY MERRITT-CHAPMAN & SCOTT TO McLEAN.

Just as was the case of the Extra Work Orders and the Lynch-McClintock subcontract, it is nowhere contended in any part of this enormous record that Petitioner had anything whatever to do with this transaction, or that he even knew of it (R. pp. 438-442). Yet, in order to support the conclusions of law finding Petitioner guilty of perjury, the trial judge went to the trouble of making two findings about this transaction as follows:

"Merritt-Chapman & Scott Corporation of New York was awarded the contract by Grant County P.U.D. No. 2 for the construction of the Priest Rapids Dam on July 9, 1956. Merritt-Chapman &

Scott paid $87,500 to the McLean Engineering Corporation, Washington, D.C., on the 25th day of July, 1956, for services connected with the Priest Rapids Project."

"That the only representative in New York at any time, of the McLean Corporation, was a sister of Joseph H. Rosenbaum, the treasurer of the corporation, that the principal place of business of the McLean Corporation was at all times located at 824 Connecticut Avenue N.W., Washington, D.C., which is the address of the law firm of Goodwin, Rosenbaum, Meacham & White." (Tr. p. 199).

This Court may note, again, that Petitioner is nowhere alluded to in these findings, that there is no contention that he played any part in this transaction, or benefited by it in any way. Nor is there any suggestion that any of this testimony was considered by the trial judge for the limited purpose of showing the materiality of the alleged perjury. On the contrary, by reference to the opinion of the trial judge, we find confirmation of the view here expressed that the trial judge had lost sight of the alleged limited purpose of this testimony and was considering these several transactions as links in the chain of Petitioner's alleged guilt, by his participation in an alleged conspiracy against the PUD.